



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Ms L McGarvey

AND

Respondent
Grafters Group Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol **ON** 24 June 2022

EMPLOYMENT JUDGE Bax

Representation

For the Claimant: Ms L McGarvey (in person)
For the Respondent: Ms S Davis (operations director)

JUDGMENT

- 1. The claims in respect of the accrual of holiday under the Working Time Regulations 1998 are dismissed.**
- 2. The Respondent is ordered to pay for the Claimant's preparation time, due to its unreasonable conduct, in the sum of £143.50.**

REASONS

1. In this case the Claimant, Ms McGarvey, brings a monetary of accrued but unpaid holiday.
2. The Claimant had notified ACAS the dispute on 20 October 2020 and the certificate was issued on 1 December 2020. The Claimant presented her claim on 29 December 2020.
3. The claim form referred to the Claimant not receiving holiday pay in 2017, because she did not know she as entitled to it. the other aspect to her claim

was that she had not been paid holiday pay or allowed to accrue holiday between 1 April 2020 and 31 July 2020.

4. It was agreed that the Claimant undertook work for the Respondent over two separate periods. The first from 2016 to October 2018 and a second from December 2019. At the start of the hearing, discussion took place about the claim in relation to holiday for the leave year ending in 2017 and that a claim in respect of holiday has to be brought within 3 months of the dates complained of. The Claimant said that she accepted she could not bring this part of the claim because it was out of time.
5. The parties agreed that if the Claimant was entitled to holiday pay whilst on furlough, that it would be for 10 days and that the gross daily rate of pay was £50.75 and therefore the claim was for £507.50.
6. The Claimant also sought to bring a claim for injury to feelings, however it was explained that the Tribunal cannot make such an award in respect of holiday pay and it was not pursued. The Claimant also said she wanted to bring a claim for losing some holiday pay when she was paid universal credit. It was explained that the Tribunal could only decide matters between the Respondent and the Claimant and it did not have jurisdiction to hear such a claim. The Claimant decided not to pursue it.
7. It was agreed that the issues to be determined were whether the Claimant was an employee or worker, whether she was a worker of the Respondent between assignments and whether she was a worker for the Respondent whilst furloughed. It was agreed that the Respondent did not consider that the Claimant had accrued any holiday entitlement whilst on furlough.

Claimant's strike out application

8. The Claimant applied to strike out the response on the basis that the Respondent failed to comply with the orders that witness statements were exchanged 7 days before the hearing and 14 days before the hearing the parties agreed a set or relevant documents. The claim was originally listed on 5 November 2021, it was postponed and relisted on 24 June 2022. No further directions were given. The Respondent sent to the Tribunal e-mail on 21 October 2021 attaching its bundle and witness statements, but it did not copy in the Claimant. On 17 June 2022, the Claimant contacted the Respondent and asked them for their documents. The Respondent contacted the Tribunal and was told to send the documents again. The Claimant received the Respondent's bundle on 21 June and the witness statements on 22 June 2022. The Claimant applied to strike out the response on the basis that she could not have a fair hearing. She did not want a postponement. The Claimant had some time to look at the documents and she said she had glanced through them, but she did not have sufficient time

to prepare and thought she needed another 30 minutes of reading time. The Respondent submitted that it thought it had complied with the order and when it became apparent the Claimant did not have the documents it sent them to her.

9. Under rule 37(1)(c) the Tribunal can strike out a response for non-compliance with the rules or an order. I took into account that striking out the claim or a response for non-compliance with an order is also a draconian step which the Court of Appeal has indicated should not be too readily exercised (James-v-Blockbuster Entertainment Ltd. [2006] EWCA Civ 684) and the decision needs to be in proportion to the offence. I had to consider all the relevant factors including the prejudice caused by the conduct or breaches, whether the nuclear option of striking the case out is proportional, whether a lesser sanction would do and, critically, whether a fair trial is still possible. In Weir Valves and Controls (UK) Ltd v Armitage 2004 ICR 371, EAT it was emphasised that all the circumstances in the case should be considered including: (1) the magnitude of the non-compliance; (2) whether the default was the responsibility of the party or his or her representative; (3) what disruption, unfairness or prejudice has been caused, (4) whether a fair hearing would still be possible; and (5) whether striking out or some lesser remedy would be an appropriate response to the disobedience. In Blockbuster, the Court of Appeal held that striking out could only be justified if the offending party had been guilty of deliberate and persistent procedural disregard or unreasonable conduct which had made a fair trial impossible. Nevertheless, even if these tests are met, it does not follow the claim *has* to be struck out. A tribunal is always left with a discretion (the use of the word '*may*' at the start of rule 37) which I have to exercise in accordance with the guidance that I have attempted to summarise.
10. In this case the Claimant had an opportunity to look at the documents, albeit not long. The Respondent thought it had complied. The Claimant needed more time to look at the documents, which could be accommodated at the hearing. It was notable that the witnesses statements for the Respondent were identical and that many of the documents in the Respondent's bundle were in the Claimant's bundle. If the response was struck out the Respondent could not defend the claim, whereas the prejudice to the Claimant was ameliorated by giving her time to consider the documents. In the circumstances it was not in the interests of justice to apply the draconian sanction of striking out the response and the application was refused.

The evidence

11. I heard from the claimant and I heard from Ms Davis, for the Respondent. Both parties provided bundles of documents.

The facts

12. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
13. The Respondent is an employment business which placed people to work in hospitality businesses in roles such as kitchen porters or assistants
14. The Claimant commenced an initial period of work for the Respondent in November 2016 and worked on many assignments and undertook various barrista, waiting and kitchen assistant/porter roles. The Claimant stopped undertaking work for the Respondent in October 2018. The Claimant started a new period of work with the Respondent on 12 December 2019.
15. The Claimant's written contract said that she was a flexi-worker with the following terms and conditions:
 - (1) Flexi-Workers are engaged under a contract for services the terms of which are set out below and which apply to each and every assignment.
 - (2) C.S.I agrees to offer to the Flexi-Worker opportunities to work where there is a suitable assignment with a Hirer (hereinafter called the "Client") requiring such a worker.
 - (3) CSI shall pay the Flexi-Worker remuneration calculated at an agreed hourly rate (to vary according to assignment) at C.S.I's discretion
 - (5) C.S.I shall be responsible for making all statutory deductions relating to Earnings Related Insurance and Income Tax under Schedule E, in accordance with the Finance Act (No. 2) 1975 ...
 - (7) Statutory leave:
 - (a) For the purpose of calculating Statutory entitlement to leave under this Clause the leave year commences 1st April and ends 31st March
 - (b) Under the Working Time Regulations 1998, the Flexi-Worker is entitled to Statutory paid leave per leave year. Holiday entitlement is 28 days per annum (inclusive of bank holidays) on a pro rata basis. All entitlement to leave must be taken during the course of the leave year in which it accrues and none may be carried forward to the next year.
 - (c) The right to paid leave only accrues once the Flexi-Worker has been engaged on Assignment through C.S.I. Entitlement to leave accrues in proportion to the amount of time worked by the Flexi-Worker on Assignment during the leave year. The amount of the payment to which the Flexi-Worker is entitled in respect of such leave is calculated in accordance with and paid in proportion to the number of hours which the Flexi-Worker has worked on Assignment during the twelve weeks prior to their taking annual leave...

- (f) Where this contract is terminated by either party and a P45 is specifically requested by the Flexi-worker within the leave year of the final Assignment the Flexi-worker shall be entitled to a payment in lieu of any untaken leave...
 - (8) The Flexi-Worker is under no obligation to accept an offer of an assignment but if he/she does so, he/she shall comply with the following conditions ...
 - (10) C.S.I may instruct the Flexi-Worker to end an Assignment with a client at any time. The Flexi-Worker may terminate employment at any time by informing the employment business.
 - (11) C.S.I will remunerate the Flexi-Worker for all work undertaken whether or not payment is received from the hirer.
16. An assignment was a placement with a client of the Respondent.
17. The way the contract operated in practice was that the Respondent would receive a request for a worker from a client and it would consider who was suitable and contact various people on the contracts and the work could be accepted on a first come first served basis. Clients were able to request a specific person. The parties agreed that the Respondent would offer the Claimant assignments, but she was under no obligation to accept them.
18. Although the Claimant generally undertook work full time, she accepted that there were gaps between her assignments and that during those gaps she was not entitled to be paid. She also accepted that during a gap in assignments she did not accrue annual leave.
19. When an assignment was accepted the Respondent sent the person who had accepted it an e-mail, which gave details of the location, dates and times of the work and the rate of pay. They were also told of any particular dress requirements by the client. If safety shoes or a specific piece of uniform was required the Respondent could provide it, if they had such equipment, but it was under no obligation to do so. When the person is on an assignment they are under the instruction of the client.
20. The Claimant in 2018, when working at Bath racecourse Christmas parties, was trusted to book the taxi for all of the people under the same contract as herself.
21. When the national lockdown for covid-19 came into effect on 23 March 2020, the hospitality industry closed down. The Claimant accepted in her witness statement all her work had gone due to this.
22. When the Furlough scheme was announced by the Government, the Claimant was initially told by the Respondent that she did not qualify.

23. The Furlough scheme was a method by which businesses could seek reimbursement from the Government of up to 80% of a worker's pay if they were furloughed, rather than being dismissed. There was not a right to be furloughed by an employer.
24. During April 2020, the Claimant disputed that she was not entitled to be furloughed and stated that she wanted to be furloughed from 1 April 2020. The Respondent reviewed its position and concluded that it had not taken into account a week's holiday and therefore the Claimant had worked for the minimum of 12 weeks. It therefore agreed to furlough the Claimant backdated to 1 April 2020.
25. On 30 April 2020, the Claimant was informed that between 12 December 2019 and the end of her holiday on 31 March 2020 she had earned £4,023.20, which equated to £253.75 per week gross, of which 80% was £203 before deductions. She was informed that holiday pay would continue to accrue as per her contract.
26. On 1 May 2020, the Respondent sent the Claimant the furlough terms which included "Please note -the number of days holiday accrued during the year shall be reduced to zero whilst furloughed."
27. I accepted the Claimant's evidence that there not any conversations with the Respondent to the effect that the Respondent was treating furlough as if it was an assignment
28. On 1 May 2020, the Claimant e-mailed the Respondent and said that the amount of her furlough pay was less than expected. On 4 May 2020 the Claimant confirmed her acceptance of being placed on the Furlough Scheme.
29. Whilst on furlough the Claimant kept in regular contact with the Respondent.
30. On 14 July 2020, the Respondent wrote to the Claimant informing her that from 1 July 2020 they could flexibly furlough workers. She was asked for her availability to work.
31. On 21 July 2020, the Respondent wrote to the Claimant and said that it was understood that she no longer lived in Bath and was not available to work in the Bath locality. The Claimant was given notice that her furlough was ending on 31 July 2020 and she would not be under the scheme with effect from 1 August 2020. The Claimant responded by saying that she still had a Bath address and was available for work.
32. On 7 August 2020 the Claimant e-mailed said that she would not accept Assignments until the furlough issue was resolved.

33. On 13 August 2020, the Claimant queried why colleagues were still being furloughed. She also said that she believed she should have accrued holiday pay whilst furloughed.
34. On 14 August 2020, the Respondent replied stating that the conditions of furlough included “Please note -the number of days holiday accrued during the year shall be reduced to zero whilst furloughed.” And therefore holiday pay was not due whilst furloughed.
35. The Government Guidance in relation to annual leave and furlough included:
 - a. Workers have the right to build up (‘accrue’ holiday entitlement while they are on temporary leave (‘furloughed’ because of coronavirus (COVID-19). They can also take leave on furlough.
 - b. A furloughed worker’s holiday pay must be calculated as normal. If the holiday pay turns out to be more than the work is paid while on furlough, their employer must pay the difference.
36. The Claimant’s evidence and submission was that there were no assignments due to the lockdown and furlough was in place of the assignment. Furlough was there to replace the money normally earned whilst on assignment. The Respondent’s evidence and submission was that the Claimant was a worker and she only accrued holiday pay whilst on assignment and that under the furlough scheme she was not able to undertake assignments. The Respondent said that furlough was not an assignment and there was not such an agreement to that effect.

The law

Holiday Pay

37. The claimant claims in respect of being denied being allowed to take holiday or holiday pay for accrued but untaken holiday under the Working Time Regulations 1998 (“the Regulations”). Regulations 13 and 13A relate to entitlement to annual leave. The effect of Regulation 13A(3) is that the aggregate entitlement to annual leave under Regulations 13 and 13A is a maximum of 28 days. Under Regulation 13(9) leave to which a worker is entitled may be taken in instalments, but it may only be taken in the leave year in respect of which it is due, and it may not be replaced by a payment in lieu except where the worker’s employment is terminated. A ‘leave year’ is defined in Reg. 13(3).
38. Regulation 14 explains the entitlement to leave where a worker’s employment is terminated during the course of his leave year, and as at the date of termination of employment the amount of leave which he has taken is different from the amount of leave to which he is entitled in that leave year. Where the proportion of leave taken is less than that which he is entitled, the

employer is required to make a payment in lieu of leave in accordance with Regulation 14(3). In the absence of any relevant agreement which provides for payment of accrued leave, then the sum is calculated according to the formula $(A \times B) - C$. For the purposes of this formula A is the period of leave to which the worker is entitled under Regulations 13 and 13A; B is the proportion of the worker's leave year which expired before the termination date; and C is the period of leave taken by the worker between the start of the leave year and the termination date.

39. Regulation 16 concerns payment in respect of periods of leave

- (1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 [and regulation 13A], at the rate of a week's pay in respect of each week of leave.
- (2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3) [and the exception in paragraph (3A)].
- (3)...

40. Reg. 30 Remedies – provides:

- (1) A worker may present a complaint to an employment tribunal that his employer—
 - (a) has refused to permit him to exercise any right he has under—
 - [(i) regulation 10(1) or (2), 11(1), (2) or (3), 12(1) or (4), 13 or 13A;]
 - ...
 - (b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).
- (2) [Subject to [[regulation] 30B], an employment tribunal] shall not consider a complaint under this regulation unless it is presented—
 - (a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;
 - (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.

41. In King v Sash Window Workshop and anor [2018] ICR 693, The ECJ held that the directive requires a worker to be able to carry over and accumulate paid annual leave rights until the termination of his or her employment where those rights have not been exercised over several consecutive reference periods because the employer refused to provide holiday pay.

The decision applied to the 4 weeks leave under the directive. In King the Claimant had been wrongly characterised as self-employed and there was a refusal to remunerate annual leave

42. In Smith v Pimlico Plumbers Ltd [2022] EWCA Civ 70, it was held that King did not require workers to show they were in fact deterred from taking leave. Rather, not granting paid annual leave was liable to dissuade a worker from taking annual leave is incompatible with article 7 of the directive (para 63). It was established in King that the right to paid annual leave cannot be lost unless the worker has had the opportunity to exercise that right before termination of the employment relationship. In Smith the Claimant had taken leave but was not paid for it. The Court of Appeal held that the King principle applied to workers in Mr Smith's position and that an employer who does not allow a worker to exercise the right to paid annual leave must bear the consequences (para 79).

Employment status

43. S. 230 of the Employment Rights Act 1996 provides

“230 Employees, workers etc

(1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly.

(4) In this Act “employer”, in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act “employment”—

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract; and “employed” shall be construed accordingly.”

44. The test for employment status was confirmed in paragraphs 18 to 19 of Lord Clarke's judgment in Autoclenz Ltd v Belcher [2011 ICR 1157 in the Supreme Court:

"18 : As Smith LJ explained in the Court of Appeal of paragraph 11, the classic description of a contract of employment (or a contract of service as it used to be called) is found in the judgement of McKenna J in Ready Mixed Concrete South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, 515C : "a contract of service exists if these three conditions are fulfilled: (i) the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service ... Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be".

19: Three further propositions are not I think contentious: i) As Stephenson LJ put it in Nethermere St Neots Ltd v Gardiner [1984] ICR 612, 623 "There must ... be an irreducible minimum of obligation on each side to create a contract of service". ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: Express and Echo Publications Ltd v Tanton ("Tanton") [1999] ICR 693 per Peter Gibson LJ at p 699G. iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg Tanton at page 697G."

45. Clarke LJ in Autoclenz in the Supreme Court discussed the cases where the written documentation may not reflect the true reality of the relationship. These include Kalwak and Szilagyi, and the Court of Appeal decision in Aurtoclenz. In paragraph 29 Clarke LJ preferred the approach of Elias J (as he then was) in Kalwak, and the Court of Appeal in Szilagyi, to that of the Court of Appeal in Kalwak. The question to be asked is what was the true agreement between the parties? It is important to look at the reality of the obligations and the reality of the situation. He referred in paragraph 30 to the judgment of Smith LJ in paragraph 50 of Szilagyi: "The kernel of all these dicta is that the court or tribunal has to consider whether or not the words of the written contract represent the true intentions or expectations of the parties, not only at the inception of the contract but, if appropriate, as time goes by". In paragraph 35 he concluded "so the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the

case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description".

46. In relation to worker status, it includes employees but also those under any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.
47. In Autoclenz, Lord Clarke approved of the view, first aired by Mr Justice Elias, then President of the EAT, in Consistent Group Ltd v Kalwak and ors [2007] IRLR 560, EAT, that 'the concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work, in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship'. Lord Clarke held that, in cases with an employment context, 'the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part'.
48. The Supreme Court significantly expanded the scope of Autoclenz in Uber BV and ors v Aslam and ors [2021] UKSC 5, SC. The Supreme Court pointed out that Lord Clarke's judgment in Autoclenz makes clear that whether a contract is a 'worker' contract is not to be determined by applying ordinary principles of contract law. The Court in Uber expanded on the rationale for that approach. It pointed out that it was critical to understand that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunal was primarily one of statutory interpretation, not contractual interpretation. Furthermore, that interpretation should give effect to the purpose of the legislation, which is to give protection to vulnerable individuals who have little or no say over their pay and working conditions because they are in a subordinate and dependent position in relation to a person or organisation who exercises control over their work. In the Court's view, it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a 'worker'. To do so would reinstate the mischief which the legislation was enacted to prevent. Autoclenz held that the written agreement is only a part of the factual context in which the status of the working relationship should be determined. Uber has gone further and established that the written agreement is not even the starting point for determining employment status. The key question in such cases should now be whether the relationship is one of subordination and dependence, having regard to the legislative

purpose of protecting those who have little or no influence on the terms under which they work.

49. Irreducible minimum of obligations is not a pre-requisite for worker status (Somerville v NMC UKEAT/0258/21)

Conclusions

Employment Status

50. The Claimant in her submissions said she thought that she was a worker on the basis of the contract. I considered what her status was in any event.
51. The Claimant agreed to provide her own work and skill in return for pay when placed for work with hospitality businesses. The Respondent was paid by the hirer and it paid the Claimant. The requirement for the Respondent to pay the Claimant, irrespective of whether the hirer paid, was something which could be considered more consistent with a contract of employment.
52. However when working for hospitality businesses the instructions on what work to do and how to do it were given and controlled by the hirer. The Respondent informed her of what was expected in terms of hours, the type of work and rate of pay. The Respondent had no control over the way in which the Claimant carried out that work. The Respondent agreed to offer suitable assignments, but the Claimant was free to refuse to undertake any assignment and there was no obligation upon her to accept it. This was evidenced by her e-mail in which she said she would not accept an assignment until the furlough issues had been resolved and this was accepted during her oral evidence. There was not a mutuality of obligations for the Respondent to provide work and for the Claimant to do it in return for remuneration. I was satisfied that this was the reality of the situation.
53. This was an agency contract, whereby the Respondent would seek work opportunities and offer them to the Claimant, who could decide to accept or reject them. This was wholly inconsistent with a contract of employment. The Claimant was not an employee.
54. The Respondent accepted that the Claimant was a worker. The Claimant agreed to provide her services personally for clients of the Respondent. She was not acting in the course of her own business. I was satisfied that she was a worker for the purposes of the Working Time Regulations.

Holiday pay

55. The claim concerned whether the Claimant was entitled to accrue holiday whilst on furlough. If the Claimant was entitled to accrue holiday it would be on the basis of the Working Time Regulations and the appropriate rate of pay would be 100% rather than 80%. The Claimant's contract provided that she only accrued pay whilst she was on assignments and the evidence of the parties as to how it operated matched the written documentation. The Claimant was under no obligation to accept assignments and there was no evidence that there was an agreement or promise that any gaps between assignments were to be treated as the Claimant providing work or services to the Respondent. When the Claimant declined to accept assignments after furlough, she was not paid.
56. There was no obligation on the Claimant to undertake work for the Respondent when she was between assignments. There was not an agreement or understanding that she would be treated as a worker in gaps between assignments. I was satisfied that the Claimant was only a worker when she was actually working on an assignment for a hirer.
57. Therefore it was necessary to consider whether the Claimant's position changed when she was on furlough. The Claimant was not permitted to work for the Respondent when she was on furlough. The furlough scheme was a method by which employers could retain workers on their books provide them with remuneration without them doing any work and to be reimbursed for part or all of the cost from the Government. It was a scheme designed to avoid workers being thrown onto the labour market in circumstances when businesses were unable to operate. The natural meaning of assignment with a hirer, in the context of this relationship, was being placed with a hospitality business to undertake work within it. This was also the understanding of the parties.
58. It was impossible for any hospitality work to be undertaken at the time the Claimant was furloughed. The Claimant was not assigned to work for any client of the Respondent during this time. The nature of the relationship with the Respondent meant the Claimant was only paid and accrued holiday when she was working for a client of the Respondent.
59. It was therefore necessary to consider whether the furlough relationship could be considered an assignment. The Claimant relied upon an inconsistency between the e-mail on 30 April 2020 and the furlough document sent on 1 May 2020; in that the e-mail said that she would accrue holiday as per her contract and the furlough document said she was not entitled to holiday whilst on furlough. I accepted the Respondent's suggestion that it was a clarification and there was not an inconsistency. It was not in dispute that the Respondent could not contract out of the Working Time Regulations. An employee did not have a right to furlough, and monetary side was an arrangement of reimbursement for employers. Whilst

on furlough, rights under the Working Time Regulations continued to accrue on the basis of the worker's contract. Assignment in the particular circumstances was working for a hospitality business. The furlough scheme provided that work could not be undertaken by the Claimant for the Respondent which was inconsistent being assigned to a client. There was not an agreement or a suggestion that the Respondent was treating furlough as an assignment and I was satisfied there was no such agreement. If the Claimant was not assigned, she was not paid for work and did not accrue holiday. She was not on an assignment with a client at the time of furlough and was not working and therefore she was not a worker of the Respondent at the time of furlough. Accordingly she did not accrue holiday during that time.

60. Accordingly the Respondent was not in breach of its obligations under the Working Time Regulations and the claim is dismissed.

Claimant's application for a preparation time order

61. The Claimant sought a preparation time order in respect of unreasonable conduct by the Respondent. Before making the application discussion took place as to whether it related to the proceedings as a whole or the difficulties the Claimant experienced in obtaining the Respondent's documents for the hearing. It was explained that there was a difference between unreasonable conduct and a party taking a different view as to what happened. The Claimant decided to focus her application on the difficulties she experienced during the week running up to the final hearing.

62. The Claimant sent an e-mail on 17 June 2022 saying that she had not received their documents and statements. The date the parties were supposed to exchange witness statements was 17 June 2022. The Claimant heard nothing back from the Respondent until 20 June 2022, when she was told that it had been referred to the Tribunal. The Respondent said that when the e-mail was received Ms Davis contacted the Tribunal to find out what to do as she thought she had already sent it. Ms Davis suggested that it was unclear what the Claimant wanted, however from what I was informed it was clear that the Claimant was saying she did not know what documents the Respondent had and that she needed them. I accepted that preparing for hearings is stressful and parties need sufficient time, hence the requirement to exchange statements 7 days before.

63. The Respondent received a communication from the Tribunal and then sent its bundle to the Claimant on 21 June 2022 and the witness statements on 22 June 2022. This gave the Claimant less than 2 days to consider the witness statements. The Respondent relied upon Ms Davis receiving many e-mails and that a delay of 24 hours was reasonable. I took into account the

overriding objective and the need for the parties to co-operate in the preparation of cases.

64. The relevant rules are the Employment Tribunals Rules of Procedure 2013 (“the Rules”). Rule 75(2) provides: “A preparation time order is an order that a party (“the paying party”) make a payment to another party (“the receiving party”) in respect of the receiving party’s preparation time while not legally represented. “Preparation time” means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at the final hearing.
65. Rule 76(1) provides: "a Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that – (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or (b) any claim or response had no reasonable prospect of success. Or (c) a hearing has been postponed or adjourned on the application of party made not less than 7 days before the date on which the relevant hearing begins.
66. Under Rule 79(1) the Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of – (a) information provided by the receiving party on time spent falling within rule 75(2) above; and (b) the Tribunal’s own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required. Under Rule 79(2) the maximum hourly rate for preparation time costs is currently £41.00 per hour.] Under rule 79(3) The amount of a preparation time order shall be the product of the number of hours assessed under paragraph (1) and the rate under paragraph (2).
67. Under Rule 84, in deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party’s (or, where a wasted costs order is made, the representative’s) ability to pay.
68. The correct starting position is that an award of costs is the exception rather than the rule. As Sedley LJ stated at para 35 of his judgment in Gee v Shell Ltd [2003] [2003] IRLR 82 CA “It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that in sharp distinction from ordinary litigation in the UK, losing does not ordinarily mean paying the other side’s costs ...” Nonetheless, an Employment Tribunal must consider, after the claims were brought, whether they were properly pursued, see for instance

NPower Yorkshire Ltd v Daley EAT/0842/04. If not, then that may amount to unreasonable conduct. In addition, the Employment Tribunal has a wide discretion where an application for costs is made under Rule 76(1)(a). As per Mummery LJ at para 41 in Barnsley BC v Yerrakalva [2012] IRLR 78 CA “The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it, and what effects it had.” However, the Tribunal should look at the matter in the round rather than dissecting various parts of the claim and the costs application, and compartmentalising it. It commented that the power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts, where the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. There is no need for the tribunal to find a causative link between the costs incurred by the party making the application for costs and the event or events that are found to be unreasonable, see McPherson v BNP Paribas [2004] ICR 1398 CA, and also Kapoor v Governing Body of Barnhill Community High School UKEAT/0352/13 in which Singh J held that the receiving party does not have to prove that any specific unreasonable conduct by the paying party caused any particular costs to be incurred. It is unnecessary to show a direct causal connection, (*McPherson-v-BNP Paribas* [2004] ICR 1398 and *Raggett-v-John Lewis* [2012] IRLR 911, paragraph 43), but there nevertheless has to have been some broad correlation between the unreasonable conduct alleged and the loss (*Yerraklava-v-Barnsley MBC* [2010] UKEAT/231/10). Regard had to be taken of the ‘*nature, gravity and effect*’ of the conduct alleged in the round (both *McPherson* and *Yerraklava* above).

69. Unreasonable has its ordinary English meaning and is not to be interpreted as if it means something similar to vexatious (*Dyer v Secretary of State for Employment* EAT 183/83). When considering making an order under this ground account should be taken of the ‘*nature, gravity and effect*’ of a party’s unreasonable conduct (*McPherson v BNP Paribas* [2004] ICR 1398 CA). It is important not to lose sight of the totality of the circumstances and when exercising the discretion it is necessary to look at the whole picture. We had to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had. We reminded ourselves to be careful not to label conduct as unreasonable when it could be legitimate in the circumstances.
70. The Respondent could have simply forwarded its bundle and witness statements to the Claimant on 17 June 2022, when she said she had not received them. The Respondent’s documents having already been prepared. This placed unnecessary stress on the Claimant and caused her

to spend many hours of chasing the Respondent and contacting the Tribunal, so she could prepare for the hearing. The Claimant was given extra time at the start of the hearing so that she could finish reading the documents. I accepted the Claimant's submission that the Respondent behaved unreasonably by not immediately sending the documents, when it had them and could have done so. The threshold for a preparation time order was met. In the circumstances, taking into account the size of the Respondent, I was satisfied that a preparation time order should be made.

71. In terms of the time spent chasing by the Claimant, she said she spent 20 hours. It was not accepted that the time spent was as much as 20 hours, although she had several days trying to obtain the documents. After considering the matter in the round a reasonable amount of time was 3.5 hours at the rate of £41 an hour. The Respondent is therefore ordered to pay the Claimant for her preparation time in the sum of £143.50.

Employment Judge Bax
Dated 24 June 2022

Judgment sent to Parties on
05 July 2022 By Mr J McCormick

For the Tribunal Office
